

MANAGING PARTNERSHIP RELATIONS AND CONTRACTUAL PERFORMANCE IN THE OPERATING PHASE OF PUBLIC PRIVATE PARTNERSHIP: INTERVIEW FINDINGS

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ABSTRACT

The public partner has a governance responsibility in the operational phase of Public Private Partnership projects. It must ensure that contracted services provided by private consortia are delivered and that specified delivery standards are met. The public partner thus has to manage the relationship with, and the performance of, its private partner. Literature review is used to identify operational issues relating to partnership and performance management. These are then explored through interviews with 34 senior public and private partner industry representatives from Australia and the United Kingdom. Partnership issues relate to: organisational culture; management commitment and support; employee capability and expertise; and conflict management. For performance management, the relevant issues are: key performance indicator modification; contract variation; and penalties and abatements. The interview findings show that effective management of these issues by the public partner will increase the likelihood that intended Value-for-Money outcomes are achieved in Public Private Partnership.

Keywords - Operational Governance, Partnership Management, Performance Management, PPP, Public Partner, Value-for-Money

INTRODUCTION

Although there is no universally accepted definition, for the purposes of this paper, Public Private Partnership (PPP) is characterised as a collaborative endeavour (Smyth and Edkins 2006) involving public and private partners, developed through the expertise of each partner in order to meet identified public needs through appropriate resource, risk and reward allocation (Canadian Council for Public Private Partnerships 2009). The traditionally long-term nature of PPPs (often upwards of 20 years) means that management, beyond the development and delivery phases, of the partnership itself and of the

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performance of the private partner, is likely to be important to the success of a PPP project in terms of delivering Value-for-Money (VfM) to the public.

As with PPP, there is no single definition that fully encapsulates the concept of 'VfM'. For the private partner, it may simply represent the size of its profit margins, and hence return on investment, in delivering contracted services. For government, however, VfM is based on the delivery of planned social outcomes. It is a mantra of contemporary public government and public administration.

Within context of this paper, VfM denotes:

‘A balanced benefit measure covering quality levels, performance standards, risk exposure, other policy or special interest measures, as well as price. Generally, VfM is assessed on a “whole of life” or “total cost of ownership” basis’ (Victorian Department of Treasury and Finance 2011, p.19).

While many governments have substantial experience in the development and implementation of PPP projects, there is probably a corresponding lack of maturity in terms of effective approaches to achieving VfM outcomes during the operational phase of PPPs. This is because many projects are still only in the early years of their concession periods, and the metrics for, and assessment of, the longer-term success of PPP projects is not yet fully understood.

PPP concessions are generally formalised through complex contractual agreements between the public and private partners. Sub-contracts determine the roles, contributions and behaviours that are expected from the separate parties that consort to form the private partner. However, as no contract will cover every eventuality of something going wrong, effective ongoing partnership relations between the public and private partners are important for dealing with unforeseen issues as and when they arise.

Operational complexity occurs as the constituent parties of the private partner may change over time (e.g. if loan finance transfers to a new lender). The public partner may also introduce change to the PPP, e.g. by transferring contract administration and management to a different government agency. Re-negotiation of the concession agreement occurs if the partners contemplate changes in the scope of the PPP, such as the widening of, or extension to a toll road. These factors each affect relationships between the PPP partners and the public partner's capacity to manage the performance of its private partner.

Relationship and performance management issues, in the operational phase of PPP, were explored through interviews conducted with 34 representatives from the public and private sectors. The interview findings are reported here. First, a short contextualising literature review, covering partnership management and performance management, is presented. This is followed by an account of the interview administration and interviewee demographics. The findings are then presented, together with analysis and discussion. Recommendations for practice in public sector governance during the operating phase of PPP are made.

LITERATUR REVIEW

Partnership Management

Partnership management is: ‘a relationship involving the sharing of power, work, support and/or information with others for the achievement of joint goals and/or mutual benefits’ (Kernaghan in Trafford and Proctor 2006). The partnership issues pertaining to PPP include: organisational culture; management commitment and support; employee capability and expertise; and conflict management.

Organisational culture:

Weihe (in Hodge, Greve and Boardman 2010, p.520) asserts that, in order to achieve VfM outcomes, co-operative relationships between partners must be established. Un-cooperative working environments (Klijn and Teisman 2003) can lead to operational difficulties between partners. Therefore, partnerships should be based on establishing the ‘right’ working culture (Edwards, Bowen and Stewart 2005; National Audit Office 2009, p.55) that is beneficial to both partners; and then maintaining good relations over the life of the contract (Partnerships Victoria 2003, p.16; AECOM 2007, p.75).

Developing good working relationships between partners can decrease the amount of corrective action (e.g. abatement) that might otherwise be needed to improve contract management outcomes (Ernst & Young 2008, p.13). Their study points to a significant advantage in creating cohesive relations between the partners: building such relations may improve long-term prospects of partnership outcomes thus avoiding, where possible, ‘restrictive’ and ‘mechanical’ administrative practices that may rely too heavily on specific wording of contracts (2008, p.13) rather than trying to achieve better mutually agreed outcomes by engaging their opposite partner more effectively. This is important because the ‘end goal’ for PPPs is not cost reduction (i.e. simply abating for under-performance) – it is ensuring the private partner performs to the agreed standards under the contract (HM Treasury 2011, p.15) and that VfM is being delivered as expected.

The National Audit Office in the United Kingdom (2009, p.54) (UK) goes further in claiming that poor relationships and unsatisfactory performance go ‘hand in hand’. For instance, that poorly motivated staff are less likely to strive to meet tightly scheduled milestones or Key Performance Indicators (KPIs) and may result in penalties or abatement being applied to service providers for failing to meet performance targets.

Importantly, public sector employees, including those who work in PPP projects are required, when engaged in commercial transactions, to adhere to public sector codes of conduct and applicable standards (e.g. finance legislation) and are accountable to government, i.e. Parliament and subject to examination by Auditors-General for their decision-making (E W Russell & Associates 2000, pp.80-81). Such expectations and accountabilities may constrain the use of informality and innovation in the development of good relationships between the PPP partners.

Management commitment and support:

In public partner governance of PPPs, senior public managers will control the deployment of the resources needed e.g. finance, manpower, information or other technology (Cheng, Li and Love 2000; Hope 2012) to detect or address under-performance in the delivery of services. Senior management commitment and support is thus essential for VfM achievement.

Employee capability and expertise:

A lack of public sector governance staff capability or expertise (Hope 2012) can lead to tensions between public and private partners, and eventually to service delivery under-performance (as deficiencies in expertise may be exploited by the private partner). High quality public partner contract management skills are needed to ensure satisfactory VfM outcomes (Edwards *et al* 2004, p.63). However, the Organisation for Economic Co-operation and Development (2007, p.20) claims that appropriate corporate experience among government employees is in short supply. The capability constraint may arise at any stage in the PPP life-cycle, but clearly has the potential to become acute during the longer time span of the operational phase. Lack of staff, inadequate expertise or experience, poor staff development, frequent transfer of personnel and lack of appropriate succession planning can each critically affect effective operational management.

Conflict management:

Conflict between public and private partners may be inevitable (Edwards *et al* 2004, p.55), arising from disagreements over timeframes, costs and quality issues (Leung *et al* 2004). Other factors can include: project priorities (Hope 2012); manpower resources (e.g. a lack of skills to deliver services to agreed standards); and personality conflicts (e.g. personal or professional differences between individuals and which are primarily task-driven or people-focused). Conflicting interpretation of contract requirements may occur, due to individual or organisational biases or preferences (Cambridge Economic Policy Associates 2005, pp.34-35). Any of these conflicts can be exacerbated by the long-term operational nature of PPPs, and long-standing conflicts tend to resist successful resolution.

Performance Management

Performance management comprises ‘the use of inter-related strategies and activities to improve the performance of individuals, teams and organisations’ (Management Advisory Committee 2001: p.14). For PPPs, performance management issues identified relate to: KPI modification; contract variation; and penalties and abatements.

KPI modification:

The fulfilment of organisational objectives is inextricably linked to effective performance management. Optimum levels of performance are generally not prescribed by public sector agencies (see, for example, the national Australian PPP guidelines published by Infrastructure Australia).

KPIs should be relevant, reliable and accurate (Partnerships Victoria 2003, p.131). Poorly defined KPIs can lead to failure (Evans and Bellamy 1995). KPIs should be reviewed regularly in conjunction with the private partner.

Contract variation:

Contract clauses may be modified from time-to-time by mutual agreement between the parties. Original designs and intentions are unlikely to survive intact the changes in demands and technologies occurring over spans of twenty years or more. Variations (including re-allocating risks) may be justifiable in terms of technical obsolescence (e.g. tolling systems); new legal/political requirements (e.g. health and safety; changes in service user demand) (Partnerships Victoria 2001, p.135; Edwards *et al* 2004, p.122); from decisions to modify the length of agreements as a result of scope change; and for private partner under-performance (Partnerships Victoria 2001, p.161).

In the case of under-performance, the public partner will normally reserve the right to intervene if the quality of services provided by the private partner fails to meet its obligations (Partnerships Victoria 2001, p.161). This could arise from a breach of contract such as default (through continued acts of non-compliance) (Partnerships Victoria 2001, p.148); through major default (such as insolvency); or in an emergency where the public partner may assume operational control for a period of time because the situation may be beyond the capability of the private partner to deal with it effectively (Partnerships Victoria 2001, p.161). The public partner must be aware of, and plan for, the possibility of intervention.

Penalties and abatements:

Only a small percentage of PPP projects in the UK have been subject to penalties applied for under-performance (National Audit Office 2009, p.56). In practice, penalties may be deferred to improve working relationships between the partners (or to prevent them from deteriorating further) or to off-set under-performing services with other services rendered (National Audit Office 2009, p.56). The threat of applying abatement may spur the private partner to improve its performance (Ernst & Young 2008, p.13).

The relevant issues of partnership and performance management in the operational phase of PPP are now explored in greater depth, using interviews conducted with appropriate experts from the public and private sectors.

RESEARCH METHOD AND ADMINISTRATION

The primary objective of the research was to examine how PPP operational phase partnership, performance and risk management practices can be improved to achieve better VfM outcomes. This involved developing a generic conceptual integrating model as a tool (that could support a contract administration manual) to assist government decision-makers to allocate and make better use of public sector resources during the operating phase of PPPs that may have significant and/or long-term consequences for achieving strategic public policy objectives.

The research methodology is phenomenological, and divides into two main phases using qualitative mixed methods, commencing with literature review to facilitate the initial conceptualisation of the proposed model. Semi-structured interviews were then used to gather primary data. From this data analysis, a second iteration of the model was prepared and presented to an expert focus group for scrutiny and comment. Feedback from this group was used to refine the final iteration of the model.

This paper focuses on the interview findings, relating to partnership, performance and risk management, used in the development of the second integrating model.

The interviews were conducted between October 2012 and March 2013 to explore the presence and nature of the issues identified by literature review findings. Purposive sampling was used to distribute invitations to fifty people, from the public and/or private sectors, with experience in PPP. Thirty-four (68% response rate) agreed to participate in the interview process. Two thirds of the participants were from the public sector and one third from the private sector. Two of the public sector participants were interviewed as a 'pilot study' to confirm the completeness of the semi-structured interview format.

The adequacy of the sample size for this research was determined retrospectively through identifying the 'saturation point' i.e. whereby saturation occurs when no new significant issues and diversity of answers are revealed during subsequent interviews. This point was revealed through categorisation and analysis of the interview transcript data, e.g. by comparing and contrasting the content to reveal the possibility of developing new issues.

The majority of the public sector interviewees were project directors. They have responsibility for the long-term administration of the public partner's interests in a PPP. Others included senior executives from central agencies, government departments and statutory authorities; a commercial manager; as well as a small number of PPP contract managers and a contract administrator. The purposive sample was drawn from eligible persons from the Australian Government, three Australian state jurisdictions and the UK Government.

Selected private sector participants included senior executives and managers responsible for PPP service delivery; project engineers; and partners from top-tier advisory and legal firms. Many of these participants have substantial experience working in Australian and international PPP markets.

The interviews comprised 15 meetings (40%) dealing with partnership management, 10 meetings (26%) about risk management and 13 meetings (34%) for performance management: 38 interviews in total. The difference between the number of interviewees and the total number of interviews arises because some participants agreed to be interviewed twice. Although risk management was initially treated as a separate area of management for PPP, the risk-related interview material was subsequently subsumed into partnership and performance management, given that risk is pervasive for all aspects of PPP.

For the public sector, 11 interviewees (29%) spoke about partnership management, six (16%) about risk management and nine (24%) about performance management. From

the private sector, 12 (30%) participants spoke about their experiences (four interviews each per management discipline).

The interview administration demographics, comprising interviewee identification code, interview duration and distinction between public and private sector PPP representation, are shown in Table 1. Abbreviations in identification codes are as follows: pilot study (PS); partnership management focus (PT); risk management focus (RK); and performance management focus (PF). Over 42 hours of interviews were conducted and recorded, with an average interview length of 67 minutes.

Table 1: Interview administration demographics

| Reference number | Public or private participant | Participant status | Interview length (mins) | Subsequent interview |
|------------------|-------------------------------|------------------------|-------------------------|----------------------|
| PS03^ | Public | Senior Manager | 60 | - |
| PS04^ | Public | Contract Manager | 60 | - |
| PT01-PT02 | Private | Senior Manager (both) | 90 | RK03 |
| PT03 | Public | Director | 75 | RK05 |
| PT04 | Public | Executive Director | 45* | RK08 |
| PT05 | Public | Deputy Secretary | 60 | - |
| PT06 | Public | Director | 60 | RK11 |
| PT07 | Public | Director | 60 | - |
| PT08 | Public | Director | 90 | - |
| PT09 | Private | Partner | 60 | - |
| PT10 | Public | Director | 55 | PF08 |
| PT11 | Public | Director | 75 | - |
| PT12 | Private | Group Executive | 75 | - |
| PT13 | Private | Partner | 75 | - |
| PT14 | Public | Director | 60 | PF13 |
| RK01-RK02 | Public | General Manager (both) | 60 | - |
| RK03 | Private | Senior Manager | 90 | PT01 |
| RK04 | Private | Group Executive | 60 | - |
| RK05 | Public | Director | 75 | PT03 |
| RK06 | Private | Partner | 60 | PF01 |
| RK07 | Public | Director | 75 | - |
| RK08 | Public | Executive Director | 25* | PT04 |
| RK09 | Public | Director | 90 | - |
| RK10 | Private | Partner | 75 | - |
| RK11 | Public | Director | 60 | PT06 |
| PF01 | Private | Partner | 60 | RK06 |
| PF02 | Private | Director | 60 | - |

| Reference number | Public or private participant | Participant status | Interview length (mins) | Subsequent interview |
|------------------|-------------------------------|------------------------|-------------------------|----------------------|
| PF03-PF04 | Public | Director (both) | 90 | - |
| PF05 | Private | General Manager | 75 | - |
| PF06 | Public | Commercial Manager | 60 | - |
| PF07 | Public | Contract Administrator | 75 | - |
| PF08 | Public | Director | 35 | PT10 |
| PF09 | Public | Contract Manager | 75 | - |
| PF10 | Private | Partner | 60 | - |
| PF11 | Public | Director | 75 | - |
| PF12 | Public | Director | 75 | - |
| PF13 | Public | Director | 60 | PT14 |
| PF14 | Public | Director | 60 | - |

^PS03 and PS04 –Transcripts for these pilot interviews were included as part of the partnership management data set.

*Two additional interviews were conducted immediately after the primary interviews took place, in a single session, hence the shorter duration.

The NVivo version 10 software application was used to conduct a thematic analysis of transcript data to identify important themes, using a hierarchical data coding process of ‘parent’ nodes (open codes); and ‘child’ nodes (axial codes). See Appendix 1 for the nodes created for each of the issues and sub-issues. This presents an overview of partnership, performance and risk management categorisation and provides the basis for developing the main themes for these topics.

FINDINGS

Selected findings from the interview data analysis are presented under the management factor headings derived from the literature.

Organisational culture:

Interviewees associate with one of two practical approaches for PPP contract oversight: ‘give and take’ relationship management and ‘letter of the law’ contract enforcement.

The ‘give and take’ approach accords with an organisational culture that places a premium on quality of the contract management function as well as embracing a solutions-based approach (PT03; PT13) fostered through a strong belief in the value of relationship management (PF07; PF01) – one where partners are likely to be flexible (PT05) and pull together for mutual benefit when things go wrong or when unexpected issues arise (PT13; PT03).

This contrasts with a ‘letter of the law’ approach which is likely to manifest in a strong compliance-orientated culture. According to PF06, establishing such a culture is acceptable if government is ‘100 per cent’ certain that the contract is correct; however, in practice, this is unlikely to be the case as the interviewee acknowledges that there is often room for wider interpretation in contractual clauses.

Despite the goodwill that can be generated by PPP partners and the co-operative intentions they may have, it is also argued that ‘you get what you pay for’, i.e. that money drives behaviour (RK01). This suggests that organisational culture may not always be driven primarily by the preferred contract management style of the public partner, but could be influenced by the size of the private partner’s financial margins, which in turn could then influence the extent to which consortia may ‘go the extra mile’ (or perhaps alternatively, the degree to which ‘corners could be cut’ by the private partner). The wider point is elucidated by PF13:

‘If you’ve got a deal where the private [partner] is basically making dollars but is still delivering VfM, then there’s probably a greater willingness to do things together. But if the assumptions that the private [partner] has made around the cost of delivering the services and the services are actually under pressure and it becomes a bit of a loss, then their motivation to work in flexible ways is going to diminish.’

These types of difficulties could also be exacerbated, for instance, by budgetary pressures and changing departmental priorities that can impact on the quality of the public partner’s contract management function, e.g. where cost-cutting may lead to the replacement of highly qualified staff by less skilled and less experienced employees. As a consequence, the dynamics of the relationship between the parties may change. Strategic relationships may even become a routine administrative process (PF07; PT03).

Management commitment and support:

A concern is raised about aspects of public sector departmental oversight, e.g. where PPP working committees (PT14; PF09) could be more supportive of the contract management function (PF07). In order to obtain better VfM outcomes, contract management teams should be provided with adequate resources, such as increased funding to employ suitably qualified staff who, in addition to managing routine contract management functions, have the ability to respond appropriately to strategic risks and opportunities (PT03). Not only is this an intra-departmental concern for the public partner with respect to providing the right level of funding for its contract management teams, it also extends to commitment and support from treasury and finance departments that approve agency budget allocations. In discussing public partner under-resourcing, PF04 implicitly points to a possible source of power imbalance between PPP partners:

‘We put in a lot of resources into doing the deal and you know that the private [partner] in the operational phase has its lawyers, its accountants and it is very conscious of its cost structures and all that, and we’re trying to manage with relatively cheap junior staff and without lawyers and accountants backing you up... [we cannot afford those types of] resources.’

In contrast, PT10 offers a different perspective:

‘In the first year of operations, the [payment] commitment was 100 million dollars to the private partner for service, for maintenance and for the assets being delivered. We should be managing that with quality resources and we should have funding for the right personnel to do it.’

Several interviewees (PF03; PF04; PT05; PF08; PF07) emphasise that Australian departments of treasury and finance ought to engage more closely with, and provide better levels of support and funding to, host departments (i.e. the ‘nominal’ client) for contract management. Reality might dictate that choices are made in terms of budget priorities, but if genuine VfM outcomes are to be achieved, resources must be allocated to PPP projects that will increase the likelihood that services will be delivered as intended and that expectations, as set out in business cases, are met. The other side of this coin is that public departments that manage PPPs have a responsibility to relay accurate information to the relevant treasury and finance departments in order to improve informed decision-making for future projects (PT05).

Employee capability and expertise:

The profile of the public partner’s PPP management workforce typically comprises a mixture of permanent and temporary internal employees and private sector contractors and consultants (externals) that are engaged on a fixed-term basis to augment available skill-sets. PT14 asserts that, in some cases, there is potential to improve VfM propositions e.g. through productivity efficiencies and capability building by using highly skilled contractors and consultants to fulfil specific requirements or to deal with particular issues. However, a potential risk for the public partner of relying too heavily on external contractors and consultants is that they may not adequately (or even be requested to) transfer appropriate technical knowledge to public employees (PT05), nor act in a timely way, which may result in the public partner paying high market rates for longer than necessary or being left unexpectedly to deal with skills-gaps if the external providers should leave suddenly. It is important that the public partner develops an appropriate level of in-house expertise at an individual PPP project level to lessen the impact of such risks. PT05 opines:

‘Corporate knowledge and continuity of that corporate knowledge [needs] to be maintained [better]...the current structure within the Victorian government doesn’t recognise and give enough value to that.’

Apart from providing formal learning opportunities, on the job training, opportunities for attending contract management forums and other types of professional development (PT08; PT03; PT10) for employees to improve their commercial, legal and negotiating knowledge and skills, etc (PT05; PF12; PT04; RK07; PT03), the public partner can bolster its contract management capabilities by:

- Developing better knowledge continuity between project phases e.g. by having an operations specialist involved in procurement and delivery decision-making and for understanding the key background issues and relationships (PT04; PT10; PF13);

- Creating and maintaining a document library for corporate and commercial documents (PT10; PF08; PT11; PS04) e.g. through a single online repository;
- Applying its contract management/administration manual more effectively and ensuring its currency (PF13; PT14);
- Improving succession planning (PT10; PF07) and the hand-over process more generally, including intellectual property matters (PT12); and
- Implementing and maintaining a detailed ‘calendar of deliverables’ tool, based on contractual outputs, for monitoring performance (PF12).

In addition to improving employee capability and knowledge management within individual PPP projects, interviewees (PT10; PF12; PF04; PF11; PT03; PF06; RK10; PT13; PT12) discussed the potential of the public sector to develop economies of scale across multiple projects. Interviewee PF11 points to a failure of successive governments, to take a long-term view of contracted PPPs including committing resources needed to truly understand the commonalities that exist across projects, especially those that could ultimately improve quality outcomes and drive down recurrent expenditure. With regard to the current role of the Victorian Department of Treasury and Finance in relation to the PPP project operating phase, PT10 comments:

‘Treasury is an absolutely critical stakeholder but are they well geared to managing or facilitating that pool, that resource, or that function? Their traditional role is being...the source of advice around, not just budget settings, but procurement and risk. Don’t confuse it with service delivery – absolutely be a stakeholder, be an owner or be a client for that but not the source or host for that type of thing.’

Supporting this view, PF12, PF06 and RK10 see value in the creation of a centralised public sector agency model for managing PPP business, i.e. a dedicated business unit that would manage the spectrum of PPP agreements and contracts, thus making it easier to develop the requisite depth of employee knowledge and capability in a more structured and standardised way, whilst reducing the costs that may otherwise be paid to expensive contractors and consultants to deliver similar management requirements across a number of projects. Although this may be a potentially effective solution in principle, there is a challenge over how such a unit would be governed in practice. For instance, PF04 raises questions about how the unit might relate to individual departmental and statutory authority heads who have responsibility under financial management acts for activities within their portfolio and who would be given precedence in decision-making. The feasibility of such a unit could be further complicated by a lack of critical mass of PPP projects within individual Australian jurisdictions; there may not be sufficient skill-sets to develop and then maintain necessary expertise (PF04) due to the small number of projects currently in the pipeline – unless such a unit were to be established at the federal government level and given responsibility for all projects across all states and territories (PT13). Contemporary political realities in Australia suggest that transfer of all responsibility for PPP management to federal level would not be regarded favourably by all state and territory authorities.

Conflict management:

Notwithstanding the potential benefits of the ‘give and take’ contract management approach postulated by interview participants, conflict is almost certain to occur during a 25 to 30 year concession period. Broadly speaking, two key sources of conflict are identified by interviewees (PT05; PF04; PF12; PT06; RK11; PT03; PT11; PT14; PF13; PT13; PF10).

The first source of conflict relates to situations that arise where there is potential for significant financial impacts/unforeseen cost burdens that can shape public partner VfM outcomes. Examples of these types of disputes, relating particularly to the delivery of services for social infrastructure projects, occur where:

- the public partner rigidly applies abatement for delay or under-performance during the transition phase into operations i.e. when systems and processes are still being bedded-down which results in push-back by the private partner (PT14);
- decisions taken by the state hinder the private partner in some way e.g. double-bunking in prison cells due to overcapacity that leads to higher operational costs (such as energy consumption) being absorbed by the private partner (PT11); and
- where there is non-performance or under-performance by the private partner for the delivery of defined services (PT05).

The second source of conflict relates to failure of one party to meet the expectations of the other where:

- the intent of a service specification has been misunderstood; or
- where a KPI has not been adequately defined (PT05; PT11).

Put differently, disputes can occur because the private partner has a different understanding of the service it is supposed to be delivering (PT06) or how wording contained in contractual clauses should be interpreted. Different perceptions and interpretations can therefore have a profound effect on achieving VfM outcomes where the ‘word’ can outlive the ‘intent’ in agreements (PT13; PF12; PT12). PF04 provides the following example:

‘We [currently] have a case in the Full Court of the Supreme Court over which forum should hear a dispute about whether “may” means “must”. Yes, it’s pedantic but it’s the kind of detail that we’re spending hundreds of thousands of dollars, in our case, to find out.’

Before enacting formal dispute resolution mechanisms, partners should make sufficient attempts to resolve the issue (PT05) and at least develop a shared understanding of what the facts are and what the consequences should be under the contractual framework (PT03). The degree to which the partners are able to do this may come down to the type (or quality) of relationship that the partners have (PT03) and the level of confidence and capability that public partner employees possess in dealing with their private partner counterparts (PT05). Within this context, RK11 believes that having the right experi-

ence can be crucial to achieving good outcomes as less experienced employees tend to seek expensive legal advice too often, without first considering what the public partner's position should be and attempting to reach that desired outcome through negotiation with the private partner. Furthermore, the legal opinion offered may not actually address the problem at hand, but instead is geared towards a view of what lawyers think the court would take if it had to answer the question (PT13). PF12 has a similar opinion:

‘If [contract managers] rely too heavily on legal advice to interpret clauses, it will be costly and they might get advice that’s not always in their best interests. A contract is a guide and if contract managers need an additional guide to interpret the guide, then they’re in trouble.’

KPI modification:

Operational KPIs are developed during the procurement phase. This means that they tend to be designed, often by lawyers and project teams that have limited operational experience, at a time when the least amount of information is known about the service delivery specifics of PPPs (PF10; PF12). It is therefore important to have flexibility (PF08) between the partners to review KPIs to ensure that the services being delivered actually match what was intended as part of the original business case (PF05). Such flexibility then allows the partners to take steps to address consequential misalignment between expectation and practice. Moreover, if KPIs are not well constructed, it may be difficult for the public partner to hold its private partner to account for under-performance (PT06):

‘If the KPIs are [ineffective], then you’re going to have trouble holding [the private partner] accountable, without doubt... If you get that wrong, if you don’t have people that are of the calibre that you need, you pay for it big time in PPPs.’

Modifying KPIs usually means they can be adjusted to their ‘right’ level (PF12). However, the extent to which the modification contributes towards the achievement of VfM may depend upon a range of factors including: the timing of negotiations; how much leverage the public partner has over its private partner; and the level of employee ability to broker the best deal for the public partner. As PF02 explains:

‘When you’re modifying an existing contract [or specification], you’re doing it non-competitively. As government, you’re going to have to test and look really closely at what’s changing and what the value was that you were getting... It [also] depends on the balance of power in a particular negotiation. If the [private partner] is bleeding, and if they need you to do something to avoid some kind of default, then you might have the negotiating advantages as the public [partner], whereas if you’re under specified performance, then the negotiating leverage is on the other foot. It just depends on where the balance of power lies.’

Contract variation:

Contracts get varied due to changes in scope (RK11). Variations may therefore be sought and agreed because:

- something is found to be technically wrong in the contract (RK02);

- expectations do not match the nature of agreed outputs (RK05);
- there are changes in law or government policy (RK10);
- there is a need to introduce an additional service (RK11); or
- there is an opportunity to ‘future-proof’ existing assets (PF04; RK05) e.g. to meet rising/projected service demand.

For the public partner, regardless of the driver of a variation, a crucial factor in achieving VfM is the ability of its employees to effectively assess and select the best course of action, and not inadvertently (through failing to understand the commercial and legal underpinnings of the concession deed) give away ‘something which undermines value for the state over the longer-term or which leads to [an adverse] change in [its] risk profile’ (PT14). Inadequate levels of skills and experience (see ‘Employee capability and expertise’, above) can therefore have a detrimental effect on achieving desired outcomes through planning for and administering contract variations (PF12). This can be further compounded by having to deal with uncertainty (e.g. ‘unknowns’) when trying to future-proof assets, e.g. when arising from unexpected changes or a rapid pace in technological advancement (PF04) or population growth (RK05).

Only four interview participants (RK11; PF14; PT12; PF10) provided in-depth insights into risk re-allocation between partners. It appears that this is not currently a significant concern for Australian PPPs (even though there are numerous examples of ‘failed’ ventures – most notably toll roads – stemming arguably from the use of contemporary demand risk allocation and demand forecasting models). Within an Australian context, RK11 asserts that the most likely scenario involving the state taking back risk or altering the contract during operations (in terms of facility management) would be due to mispricing the provision of ‘soft’ services e.g. catering, cleaning and other people services, where the public partner is faced with a choice between re-negotiating the deal or permitting the operator to walk away from the contract (or go into voluntary administration or liquidation).

However, anecdotal evidence emerging from the UK suggests that, in some instances, public partners in PPP projects are deciding to take-back risks associated with the provision of soft services (PF14; PT12; PF10) particularly in schools, whilst allowing the private partner to continue to maintain and operate the assets. PF14 explains why:

‘A review of [PPP] was undertaken in 2012. It concluded that there is [little] value in [the private partner providing] soft services... These types of services should be decided on a case-by-case basis but people have tended to add them in without much consideration. The exceptions are health because it’s heavily unionised... and you’re buying services and not just an asset... and prisons which have complete services including rehabilitation and training. It’s not practical with schools because the soft services aren’t intensive and the schools are small and typically only need a part-time caretaker’.

Penalties and abatements:

Although abatement (including the threat of abatement) can be an effective method for driving private partner behaviour (PF13) by providing a strong incentive to perform

under the contractual framework (PT06), interviewees PT06, PT10 and PF07 reason that the decision to apply abatement for under-performance is a matter of professional judgement. For example, in the experience of PT10, abatement should only be applied if there is an intractable problem between the partners, i.e. after all reasonable avenues for resolving the issue have been exhausted. Although this may be a contentious view (see ‘Organisational culture’, above), PT06 provides context in support of PT10’s perspective:

‘If you know that the [private partner] is doing everything he can to alleviate or address whatever issues are cropping up, then why would you abate, even if you’re entitled to under the contract? It doesn’t serve any purpose. You have a right to abate, and...the state has a very big stick, but you want to use it wisely. If you abate them, it hurts them financially but the relationship is important and it’s about give and take’.

In other words, knowing when to apply abatement and when to allow flexibility can be strategically important with respect to building and maintaining effective partnership relations (PF13; PF07; PF02; RK05; RK11). Moreover, there is some anecdotal evidence within Australia that, instead of applying abatement, partners do deals to off-set under-performance, for instance where the private partner may informally consent to do other things to compensate (PT04; PF02) such as agreeing to scope changes (PT04). However, taking these types of decisions is likely to reduce transparency in decision-making (PF02) as well as reduce the effectiveness of threatening abatement for future instances of under-performance (PT04). Other consequences of such decision-making may manifest in informal precedent being claimed (PF13) and could potentially lead to intended VfM outcomes being compromised (PT04).

DISCUSSION

Public Private Partnerships should be based on establishing the ‘right’ working culture (Edwards, Bowen and Stewart 2005; National Audit Office 2009, p.55) that is beneficial to both partners, and then maintaining good relations (Partnerships Victoria 2003, p.16; AECOM 2007, p.75; Ernst & Young 2008, p.13) over the life of the contract to deliver agreed outcomes (Weihe in Hodge, Greve and Boardman 2010, p.520). Un-cooperative working environments (Klijn and Teisman 2003) often lead to operational difficulties between partners, and poor relationships and unsatisfactory performance go ‘hand in hand’ (National Audit Office 2009, p.55). Therefore, to achieve VfM outcomes, the interview findings show that the public partner should effectively manage the tension between partnership management and performance management. In addition to applying mechanisms for reducing negative behaviour e.g. abatement, public partner decision-makers should encourage positive behaviour in their private partner through incentives that drive the ‘right performance’ culture. This could be where the private partner goes ‘above and beyond the call of duty’. Such behaviour may foster a stronger ‘working together’ culture between partners.

Commitment and support from senior public partner management may be needed to address under-performance (Harback *et al* in Chan *et al* 2004; Hope 2012) or other dif-

difficulties (Pinto and Slevin 1987) that arise between public and private partners in PPP. For the public partner, a contract manager may be supported through the provision of additional resources such as more staff or the allocation of more time to review and then report upon complex service delivery outcomes (Arthur Andersen and Enterprise LSE 2000, p.38; Cheng, Li and Love 2000). Interview participants suggest that PPP working committees should generally be more supportive of the contract management function and recognise that in order to obtain better VfM outcomes, contract management teams should be provided with necessary resources.

A lack of resourcing can make it difficult for public partner contract managers to monitor the effectiveness of private partner performance, particularly over an extended period of time. Skill limitations (Organisation for Economic Co-operation and Development 2007, p.20; Yuan *et al* 2009; Hope 2012) may also impact on the public partner's ability to effectively manage contracts which may hinder the achievement of VfM outcomes (Edwards *et al* 2004, p.63; Organisation for Economic Co-operation and Development 2007, p.20) and compromise public safety and satisfaction. The interview findings confirm this view. A potential risk for the public partner, in relying too heavily on external contractors and consultants, is that they may not adequately transfer appropriate technical knowledge to public employees, nor do so in a timely way, which may result in the public partner paying high market rates for longer than necessary or be left unexpectedly to deal with skills-gaps if the external providers should leave suddenly. Although weighted towards a compliance-orientated approach to contract management, there is merit in using a calendar of deliverables tool to support junior public partner contract managers in managing tasks as specified under a concession deed. Such a system can be configured to meet the requirements of individual PPP contracts in a way that 'takes users step-by-step through what they need to do, how it should be done and when to do it'.

Conflict between public and private partners may be inevitable (Edwards *et al* 2004, p.55). However, conflict should be managed to reduce animosity and build understanding and trust. Broadly speaking, disagreements arise over timeframes, costs and quality issues (Leung *et al* 2004) as well as project priorities (Hope 2012); manpower resources; and individual or organisational biases or preferences. Interview participants point to significant financial impacts/unforeseen cost burdens that can shape public partner VfM outcomes, where one partner fails to meet the expectations of the other e.g. where the intent of a service specification has been misunderstood or where a KPI has not been adequately defined. PPP partners should operate a 'no blame' culture. Such a mindset can be a more efficient and effective way to overcome obstacles compared with apportioning blame to a particular person or party. Issues that are not easily resolved should be escalated and managed (as appropriate) with relevant contractual clauses and dispute resolution mechanisms. Having occasional or periodic discussions with private partner representatives can be valuable for keeping an open dialogue to understand what the long-term intentions are that can impact on the contract.

If KPIs are difficult to measure, they can adversely impact on the public partner's ability to successfully monitor and review private partner performance (Evans and Bellamy 1995). Ideally, but depending upon the nature of the contract, performance ranges for

KPIs should be reviewed regularly in conjunction with the private partner. It is therefore important to have flexibility between the partners with respect to KPIs to ensure the services being delivered actually match those intended as part of the business case; and to take necessary steps to address consequential misalignment between expectation and practice. From a public partner perspective, the need for change may arise, for example, over governance structure inadequacies, trend analysis findings e.g. patterns identified in failure event reports/output exception reports, service user complaints, audit findings, variations to contractual agreements arising from wider industry drivers e.g. economic recession. Changes should be relevant, measurable, repeatable and achievable.

With regard to threat posed by force majeure events or risk re-allocation, e.g. ‘take-back’ of services that may lead to variation of a concession deed, business continuity plans should be developed to address the issues faced (Partnerships Victoria 2001a, p.161) before the risk becomes an event, and to ensure uninterrupted service delivery if the event is realised. The public partner should at least obtain from its private partner the basis on which the latter’s opinions are formed, the services that are/likely to be affected, how long they are expected to be affected, measures that the consortia will employ to avoid or minimise disruption (including associated costs), insurance policy details as well as regular updates on the situation. This information could be used as a foundation for activating public partner business continuity plans (as well as documentation received from other relevant sources). If separate from its business continuity planning efforts, government should initiate its communication plans to inform key stakeholders (including the public) of ongoing developments e.g. service availability and risks to public safety.

For most social infrastructure PPPs, financial incentives are offered to private partner operators in the form of regular structured payments from the public partner. Deductions may be applied (typically due to an accumulation of penalty points which is then used to calculate an abatement) for failing to meet KPIs for instances of under-performance or non-compliance. Such abatements should be consistently applied unless there is a properly justified case for not doing so, e.g. to foster positive working relationships (Ernst & Young 2008, p.13; National Audit Office 2009, p.56). Interview participants reason that the decision to apply abatement for under-performance is primarily a matter of professional judgement. Knowing when to apply abatement and when to allow flexibility can be strategically important with respect to building and maintaining effective partnership relations. The rationale for each instance of non-abatement should be fully documented to protect against public audit or departmental/external agency criticism. Although the concession deed is the reference point and is considered as the ‘line in the sand’ between the parties when agreement cannot be reached, it should be routine to document decisions that vary the administration or implementation of the contract. The benefit of effective documentation extends to clearer lines of accountability (crucial for the public partner), fewer misunderstandings between partners, and reducing the potential for conflict.

CONCLUSIONS

Partnership and performance management are essential elements within a PPP operational environment. Analysis of interview data, gathered from appropriate experts, confirms that aspects of partnership management that are important for public partner governance during the operational phase of PPP include: organisational culture; management commitment and support; employee capability and expertise; and conflict management. The important issues for performance management remain as KPI modification; contract variation; and penalties and abatements. Risk pervades both management perspectives.

The most significant findings are two-fold. First, there is a link between the public partner's contract management style for achieving a positive organisational culture and satisfactory delivery of VfM. Organisational culture, however, is not always driven by the preferred contract management style of the public partner: 'you get what you pay for'. This suggests that the public partner's decision-making can be influenced by the size of the private partner's financial margins.

Second, sufficiently skilled and experienced public partner employees are critical for achieving satisfactory VfM outcomes. Failure of governments to attract and retain high calibre employees may undermine value for the state in the long term, or lead to an adverse change in the public partner's risk profile.

Only by effective management of these partnership and performance issues will the public partner, in its governance role, increase the likelihood that intended VfM outcomes are achieved during the operational phase of PPP projects. Further attention could usefully be given to exploring ways in which the public partner can drive operational performance, but not at the expense of irreparable damage to the partnership relationship.

LIMITATIONS AND CONTRIBUTION

This research focuses on the elements of partnership and performance management in the operating phase of PPP. This means that other factors that may contribute towards achieving VfM outcomes are not dealt with here.

The research contributes to the advancement of the 'body of knowledge', with respect to public partner governance of PPP in the operating phase, by conducting an in-depth qualitative study into partnership and performance management. Many of the interview

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participants have substantial experience working in Australian and international PPP markets. Their views carry substantial weight.

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APPENDIX 1: CATEGORISATION OF NVIVO DATA FOR PARTNERSHIP, PERFORMANCE AND RISK MANAGEMENT

| Topic | Parent node | Child nodes | Number of references |
|------------------------|---------------------------------------|---------------------------------------|----------------------|
| Partnership management | Organisational culture | Personalities and abilities | 7 |
| | | Team working | 7 |
| | | Motivation and incentives | 29 |
| | | Organisational culture | 27 |
| | Mgt commitment and support | Mgt commitment and support | 9 |
| | | | |
| | Employee capability and expertise | Centralisation of contract management | 12 |
| | | Oversight by Treasury - PPP units | 18 |
| | | Consultancies | 12 |
| | | Employee capability / expertise | 33 |
| | Clear and open communication | Clear and open communication | 9 |
| | | | |
| | Relationship continuity | Relationship continuity | 12 |
| | | | |
| | Conflict management | Values and beliefs | 14 |
| | | Under-performance / non-performance | 4 |
| | | Conflict management | 7 |
| Performance management | Performance mgt systems modification | System types | 8 |
| | | Performance mgt | 3 |
| | | | |
| | KPI modification | KPI modification | 13 |
| | | | |
| | Availability/integrity of data | Availability/integrity of data | 7 |
| | | | |
| | Performance monitoring and evaluation | Performance evaluation | 20 |
| | | Opportunity (risk) implementation | 8 |

| Topic | Parent node | Child nodes | Number of references |
|-----------------|-----------------------------------|---|----------------------|
| Risk management | Penalties and abatements | | |
| | | Applying penalties and abatements | 8 |
| | | Incentive revisions | 20 |
| | Implementation of transition plan | | |
| | | Implementation of transition plan | 6 |
| | Contract variation | | |
| | | Modification of existing services | 12 |
| | | Re-allocation of risk | 7 |
| | | Business continuity planning modification | 5 |
| | Consortium/agency authority | | |
| | | Consortium/agency authority | 13 |
| | Managed termination | | |
| | | Service provider failure | 3 |
| | | Voluntary termination | 5 |
| | | Managed termination | 9 |
| | End of concession hand-over | | |
| | | End of concession hand-over | 5 |
| | Reputation damage | | |
| | | Confidentiality | 9 |
| | | Reputation damage | 20 |

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